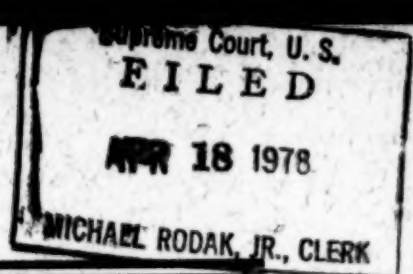


No. 77-1161



In the Supreme Court of the United States
OCTOBER TERM, 1977

ALBERT C. DREBIN, *et al.*, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The original opinion of the court of appeals (Pet. App. 4-33) is reported at 557 F.2d 1316. The amended opinion on rehearing (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1977. The order on rehearing (Pet. App. 1-2) was entered on January 23, 1978. The petition

for a writ of certiorari was filed on February 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of unlawfully seized evidence was harmless error.
2. Whether the evidence was sufficient to support petitioners' convictions.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted on six counts of willful copyright infringement for profit, in violation of 17 U.S.C. 104; three counts of interstate and foreign transportation of stolen property, in violation of 18 U.S.C. 2314; and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Drebin was sentenced to concurrent one-year terms of imprisonment on each count and fined \$20,000; all but three months of each prison term was suspended, and Drebin was placed on probation for three years. Petitioner Fine was sentenced to concurrent nine-month terms of imprisonment on each count and fined \$10,000; execution of the prison sentence was suspended and Fine was placed on probation for three years. Petitioner Budget Films was fined a total of \$18,000.¹ The court of appeals af-

¹ Co-defendant Bruce Venezia was convicted of conspiracy. He was sentenced to six months' imprisonment; execution of

firmed (Pet. App. 4-33). On petition for rehearing, the court of appeals reversed the convictions on three of the copyright infringement counts (Pet. App. 1-2). The court remanded for a new trial on those three counts and for resentencing on the seven remaining counts.

1. Petitioners were convicted for illegally selling prints of copyrighted motion picture films to three unindicted co-conspirators who operated film libraries or rental agencies in the Republic of South Africa. Twenty-six films were named in the conspiracy count, and six of these, one in each copyright infringement count, were also specified in the substantive charges against petitioners.² Petitioners stipulated that each of the films listed in the indictment had been validly copyrighted (Tr. 4177).

The evidence at trial showed that petitioner Budget Films was a corporation licensed to lease films produced by several major film studios. Petitioner Drebin was Budget's president. Petitioner Fine was the corporation's vice-president and later its secretary-treasurer. On September 11, 1974, unindicted co-conspirator John Holmes purchased approximately 81 film prints from petitioners for over \$14,000 (Tr. 1584-1590, 1640-1642). Holmes received the prints in South Africa on September 26, 1974 (Tr. 1587,

the sentence was suspended, and he was placed on two years' probation and fined \$1,000.

² The films specified in the copyright infringement counts were "Paper Moon," "The Way We Were," "Hot Rock," "Forty Carats," "The Take," and "The New Centurions."

1590).³ On two occasions in June 1974, unindicted co-conspirator Peter Theologo purchased television films from Drebin and Fine. He paid \$14,700 for prints of approximately 200 different episodes drawn from several television dramatic series (Tr. 1776-1782, 1788-1795). The prints involved in both transactions were shipped to South Africa (*ibid.*). Harry Katz, the third unindicted co-conspirator, paid \$1,075 for three film prints purchased from petitioners Drebin and Fine around June 25, 1974 (Tr. 1856-1862).⁴ Several days later, on June 29, 1974, Katz purchased three more movie prints from Fine for approximately \$1,000 (Tr. 1869-1873).

Representatives of nine motion picture and television studios that had produced all the films charged in the indictment testified for the government. They stated that the copyrighted films named in the indictment had been distributed only under licensing arrangements and that no prints of those films had ever been sold (Tr. 295-297, 464, 682-683, 845, 1023, 1198, 1277, 1391, 1481). They testified further that petitioners had not been authorized to sell or possess any of the films specified (Tr. 325, 345-346, 515-518, 703-704, 881-882, 1051, 1303, 1407, 1506-1507).

³ Included among the prints purchased by Holmes were four copies of "The Way We Were," one copy of "Hot Rock," four copies of "Forty Carats," and two copies of "The New Centurions" (Tr. 1590).

⁴ Included among the prints purchased by Katz were two copies of "The Take" and one copy of "Paper Moon" (Tr. 1857, 1865).

The nine film studio representatives also described the manner in which worn films are destroyed. Eight of the companies employed professional film salvage firms to process their used films (Tr. 339, 615-618, 784-786, 885, 1054, 1216, 1363-1373, 1534-1535). Salvage company representatives testified that worn prints are either burned, shredded, washed to remove the images, or cut into short segments and sold as "leader" strips to be used for the identification and protection of new reels of film (Tr. 3438, 3447, 3473). They also testified that their firms destroy old films pursuant to contracts with motion picture studios and others in the film industry (Tr. 3412-3413, 3420, 3447, 3471-3473, 3493). They indicated that salvaged film, when resold in the form of "leader" strips, is made available in segments no longer than 300 feet (Tr. 3481-3484). The "leader" film is sold only to a small number of film editing companies, which certify that they will destroy the film (Tr. 3422-3424, 3465). Salvaged film is not sold to the public (Tr. 3421).

2. On January 7, 1975, agents of the Federal Bureau of Investigation obtained a warrant to search the premises of Budget Films and to seize illegally reproduced and stolen films, business records relating to the manufacture and marketing of such films, and equipment used in the unlawful enterprise.⁵ The fol-

⁵ The search warrant authorized FBI agents to seize the following (Pet. App. 7):

lowing day several agents executed the warrant; they seized 551 films and several file cabinets and boxes filled with business records. Petitioners moved to suppress these materials, contending that the affidavit in support of the warrant did not state probable cause and that the warrant itself did not specify the property to be seized with sufficient particularity to satisfy Fourth Amendment requirements. The district court denied the motion (Tr. 33-96). At trial the government introduced 21 documents seized during the search.* FBI Agent Lawrence Henkel, who had supervised the search, testified concerning information acquired during execution of the warrant. According to Agent Henkel, no record of film sales by

* * * illegally reproduced and stolen copies of 35 mm, 16 mm, and 8 mm motion picture films which are duly copyrighted and protected by the provisions of the United States Copyright law embodied in Title 17, United States Code; books, records, papers and other documents relating to the manufacture and sale of such motion pictures and equipment used in the sale and distribution of such motion pictures which are the fruits and instrumentalities of violations of Title 17, United States Code, [Section 104, and Title 18, United States Code, Sections 2,] 371 and 2314.

* The documents showed petitioner Drebin's familiarity with copyright law and co-defendant Venezia's association with the illegal scheme. Among the documents were a Budget Films catalog and supplement in which petitioners offered films for sale, three letters from a company called Ivy Films relating to Budget's unauthorized leasing of films licensed exclusively to Ivy for distribution, communications with the Library of Congress and the Copyright Office, three publications dealing with copyright laws, and eleven cancelled checks payable to co-defendant Venezia (Tr. 2539-2571, 2830-2831).

Budget was discovered during the search, and every can of film at Budget displayed a printed warning recommending the exercise of caution to avoid film theft (Tr. 2573-2574, 2586-2587).

The court of appeals concluded that the warrant was invalid because it authorized an unlawful general search of Budget's premises. The court found that the warrant "provided no guidelines for the determination of which films had been illegally reproduced" and thus "left to the executing officers the task of determining what items fell within the broad categories stated in the warrant" (Pet. App. 8-9). The court ruled, however, that the district court's error in admitting evidence seized during the search was harmless beyond a reasonable doubt. The court found that the documents introduced to show petitioner Drebin's familiarity with copyright law had not contributed to his conviction because Drebin had stipulated that he was "completely familiar with the copyright laws of the United States, including the criminal provisions" (Pet. App. 10; Tr. 2964-2965). The court further observed that Agent Henkel's testimony and all the evidence obtained from the search, except the cancelled checks,⁷ had been offered to prove willfulness. On appeal, petitioners did not challenge the sufficiency of the evidence regarding that element of the offenses with which they were

⁷ The court of appeals concluded that introduction of the cancelled checks was harmless "in light of other untainted evidence * * * which was sufficient to establish Venezia as a member of the charged conspiracy" (Pet. App. 12).

charged, and, in any event, the independent, untainted evidence of willfulness was overwhelming (Pet. App. 10-11).

ARGUMENT

1. Petitioners contend (Pet. 8) that the court of appeals should not have made a finding of harmless error without first remanding to the district court for a hearing to determine whether the government used illegally seized material to develop other evidence produced at trial. This argument is without merit.

While the government bears the burden of showing that the evidence introduced at trial was not derived from an unlawful search, a defendant "must go forward with specific evidence demonstrating taint" before the government is required to meet its burden of persuasion. *Alderman v. United States*, 394 U.S. 165, 183; *Nardone v. United States*, 308 U.S. 338, 341; *United States v. Villano*, 529 F. 2d 1046, 1058 (C.A. 10), certiorari denied, 426 U.S. 953; *United States v. Crouch*, 528 F. 2d 625, 629 (C.A. 7), certiorari denied, 429 U.S. 900; *United States v. Pike*, 523 F. 2d 734, 736 (C.A. 5). Petitioner did not suggest in either the court of appeals or the district court that any evidence other than the documents seized and Agent Henkel's testimony was the product of the illegal search and therefore should be suppressed. They may not raise such a claim for the first time here. *Lawn v. United States*, 355 U.S. 339, 362-363 n. 16; *United States v. Lovasco*, 431 U.S. 783, 788 n. 7.

Moreover, even now petitioners point to only one additional piece of evidence allegedly obtained from the illegal search—petitioner Drebin's stipulation that he was thoroughly familiar with the copyright laws of the United States. This stipulation, however, was in no sense compelled by the admission of documentary evidence seized from the offices of Budget Films. The denial of petitioners' suppression motion in the district court did not require Drebin to stipulate to facts that the disputed documents tended to prove.* Drebin could easily have remained silent and thereby preserved his objection for appeal. Accordingly, the court of appeals did not err in failing to remand for the hearing that petitioners assert was necessary.

Petitioners also challenge (Pet. 9-12) the court of appeals' conclusion that admission of evidence actually seized in the illegal search was harmless error. That evidence was introduced for the sole purpose of demonstrating the willful nature of petitioners' copyright infringement. Whether the government presented sufficient independent, untainted evidence to establish the willfulness of petitioners' conduct is a purely factual question that does not merit review by this Court. In any event, as the court of appeals' summary of the evidence indicates (Pet. App. 11-

* This case is not like *Harrison v. United States*, 392 U.S. 219, where petitioner testified in order to explain certain illegally obtained confessions that had been wrongfully admitted into evidence.

12), the independent proof of willfulness was "overwhelming."

2. Under the so-called "first sale doctrine," the prosecution in a criminal copyright infringement case must prove that the particular copy or copies of a copyrighted work sold by defendant were not first sold by the copyright owner. As explained in *United States v. Wise*, 550 F. 2d 1180, 1187 (C.A. 9), certiorari denied, October 31, 1977 (No. 77-5457): "[T]he first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy." * See also *United States v. Atherton*, 561 F. 2d 747, 750 (C.A. 9). Petitioners now urge (Pet. 12-15) that the government has not carried its burden of establishing that the film prints sold by petitioners had not been first sold by the copyright owners. The court of appeals correctly concluded (Pet. App. 1-2, 15-20) that, at least with respect to the three copyright infringement counts on which the convictions were affirmed, the government's evidence was sufficient.

At trial, the government attempted to show that the copyright owners had never sold *any* prints of the films specified in the copyright infringement counts and, *a fortiori*, that the prints sold by peti-

* The first sale doctrine is derived from 17 U.S.C. 27, which provides in pertinent part:

[N]othing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

tioners had not been "first sold." Film studio representatives testified that prints of the films in question had been distributed exclusively under licensing arrangements and that none had been sold. The court of appeals reviewed the license agreements and found that none constituted sales.¹⁰ Petitioners now assert, however, that defense evidence established that a print of the film "Dillinger"—one of the 26 films named in the conspiracy count of the indictment—had been first sold by its copyright owner to a film salvage company, which in turn had sold the com-

¹⁰ On rehearing, it appeared that the license agreements between Columbia Pictures and the American Broadcasting Company ("ABC") concerning the right to televise three of the six films named in the copyright infringement counts were identical to an agreement between the same parties regarding another film that the court of appeals, in an earlier case, had treated as a sale. See *United States v. Wise*, *supra*, 550 F.2d at 1191, 1194. As a consequence, the court of appeals found that "first sales" had occurred in connection with the three films in this case that had been licensed to ABC. The court reversed petitioners' copyright infringement convictions on the counts specifying these three films and remanded for a new trial at which, the court said, the government would be required to prove the source of the prints sold by petitioners. We believe this was error. The three films involved were "The Way We Were," "Forty Carats," and "The Take." As indicated previously (see notes 3 and 4, *supra*), the evidence at trial showed that petitioners had sold four copies each of the first two films and two copies of the third. Thus, even if, with respect to each film, one of the prints sold by petitioners was the print first sold to ABC, the additional prints could not have been "first sold", and the copyright infringement convictions should have been sustained on those counts.

plete print to a third party.¹¹ On this basis, petitioners contend that the other films listed in the indictment might also have been obtained from film salvage companies following legitimate first sales of the prints by the copyright owners. The argument is unpersuasive.

While the court of appeals has held that a sale to a salvage company may constitute a "first sale" for copyright purposes (see *United States v. Atherton*, *supra*, 561 F.2d at 751), the court in this case properly determined that the testimony of salvage company representatives was "sufficient to prove that [petitioners] did not obtain from salvage the films which they are charged with infringing" (Pet. App. 19). The salvage company witnesses stated that salvaged film is never sold intact, but is either destroyed or sold in short segments to film editing companies who use it to protect new film. The court found petitioners' evidence regarding the purchase of "Dillinger" "inconclusive and insubstantial" (Pet. App. 20). The defense witness, Charles Parker, testified that he did not know whether he had purchased a complete print of the film. Moreover, an executive of the copyright owner, American International Pictures, Inc., testified that no 16 mm print of "Dil-

¹¹ The film was allegedly purchased by Charles Parker, the fiance of petitioner Drebin's daughter. Parker testified that he bought the film from the salvage company for Hollywood Film Exchange, the employer of co-defendant Venezia (Tr. 3001-3007, 3019, 3025-3028). Parker further testified that he did not know whether he had purchased a complete copy of "Dillinger" or any other film (Tr. 3031-3032).

linger" had ever been sent to the salvage company patronized by Parker (Pet. App. 20; Tr. 4091-4093, 4102). Petitioners presented no evidence that any salvage company had ever sold a print of any of the six films named in the copyright infringement counts.

Contrary to petitioners' assertion, the court of appeals' decision did not involve a misapplication of the "first sale" doctrine.¹² The court simply made a factual determination that, under prevailing legal standards, the government's evidence was sufficient to support petitioners' convictions. This determination was correct and does not warrant review by this Court.

¹² The court of appeals in *Atherton* applied the "first sale" doctrine in a manner unduly favorable to copyright infringement defendants. It said that when at least one print of a copyrighted film has been "first sold" by the copyright owner, the prosecution in a criminal copyright infringement case bears the burden of affirmatively proving the source of the prints of that film sold by defendant. 561 F. 2d at 750-751. This was error. The prosecution's burden in such a case should be satisfied either by proof of the whereabouts of the "first sold" prints and a showing that the prints sold by defendant could not have been those first sold by the copyright owner or by proof that the number of prints sold by defendants was greater than the number of prints "first sold" by the copyright owner and that therefore defendant necessarily sold some prints in violation of the copyright laws. The court of appeals' comments in *Atherton* are detrimental to the prosecution and, as applied in this case, could only have helped petitioners. This issue, however, relates solely to the three reversed counts and thus affords no occasion for review of the convictions affirmed by the court of appeals, which are the ones under attack here by petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.